

## DOJ's Latest FCPA Pressure Tactic: Charging Multiple Violations for Single Alleged Payment Scheme

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*This week, we are pleased to have a guest post from [Kevin Daly](#). Attorney Daly is a member of the firm's Manufacturing Industry Group and also its Trade Compliance Team.*

The Foreign Corrupt Practices Act ("FCPA") prohibits paying or offering bribes to foreign officials to obtain business advantage. In some instances, the paying or offering of bribes prohibited by the FCPA may involve multiple electronic communications sent over time. A federal court in New Jersey recently considered the novel issue of whether multiple communications in furtherance of a single bribe can be charged as multiple offenses under the FCPA.

The case arises out of an FCPA investigation and settlement involving Cognizant Technology Solutions Corp., a New Jersey-based IT technology and consulting company. In 2014, a senior official in the Indian state of Tamil Nadu demanded a \$2 million bribe from the construction firm building a facility for the company. Two company executives allegedly authorized the contractor to pay the bribe and allegedly directed employees to conceal the bribe by altering the contractor's change orders. The company self-reported, received a declination of prosecution from DOJ, and reached a civil settlement with the SEC for \$25 million. The two executives were indicted and charged with one count of conspiracy to violate the FCPA, three counts of FCPA bribery violations, and eight counts of accounting and books and records violations.

One of the executives moved to dismiss some of the charges, arguing that the three bribery counts are duplicative. The executive was charged with three counts because he allegedly sent three emails in furtherance of the bribery scheme. The executive argued that what the FCPA prohibits is paying, offering, promising, or authorizing a bribe. Here, he only allegedly authorized one bribe. He contends that while using instrumentalities of interstate commerce (here, email) is a basis for jurisdiction under the FCPA, the violation is not sending emails, but rather the underlying authorization of one bribe. In opposition to the motion to dismiss, the government argued that each use of an instrumentality of interstate commerce is a separate violation under the language of the statute. As there is no case law directly on point, the parties' arguments focused on statutory interpretation, the purpose of the FCPA, legislative history, and analogies to other federal criminal statutes.

On February 14, 2020, the court issued a decision denying the motion to dismiss and concluding that the three bribery counts are not duplicative. The court reviewed the grammatical structure and

language of the FCPA statute and other analogous statutes and concluded that each email could constitute a separate offense. The court reasoned that the “domestic use of international communications as a means of accomplishing foreign bribery by remote control bears enough earmarks of wrongfulness to suggest that it is central to the offense, and not a mere jurisdictional appendage.” However, in a footnote the court stated that “should convictions be obtained on more than one of these counts, the Court will ensure that multiple punishments are not inflicted for the same scheme.” Additionally, the court suggested, but did not decide, that there may come a point at which “overcharging a large number of communications” could confuse the jury or prejudice the defendant.

Because this issue regarding how to “count” FCPA violations has not been litigated before, it remains to be seen how influential the New Jersey court’s decision will become. In the short term, it may lead the DOJ to take a more aggressive position in charging violations based on multiple emails or phone calls in multiple counts. However, the New Jersey court’s decision is not binding on any other court. It remains to be seen whether other judges will find the New Jersey court’s analysis persuasive or whether they will reach a different conclusion after examining the statute, legislative history, and analogous statutes. Ultimately, if there is to be a more definitive resolution of the issue, it would likely have to come either from an appellate court or if a consensus position develops in the district courts. Until then, it bears watching whether this decision leads to any changes in how DOJ charges cases involving bribery schemes involving emails and other communications.

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